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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	

To the Commission:

COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC"), through its attorneys, submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding. KMC is a facilities-based competitive local exchange carrier ("CLEC") operating throughout the United States.[1] KMC and its affiliates are building high-speed high-capacity advanced fiber networks to provide a range of services to business customers, including local and long distance voice and data services.

The Commission's primary goal should always be to foster competition, not only because the Act requires the Commission to do so, but also because competition encourages the efficient use of, and investment in, telecommunications networks. With respect to intercarrier compensation, cost-based rates promote efficient competitive entry and competition, which in turn expands consumer choice, spurs innovation, and moves end user prices toward cost. Intercarrier compensation regimes that allow carrier voluntarily to agree to bill-and-keep, or that require bill-and-keep where the traffic flow between competing carriers is roughly equal, are consistent with this principle. However, the imposition of mandatory bill-and-keep where the

[1] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. Apr. 27, 2001) ("NPRM").

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traffic flow between competing carriers is not roughly in balance sets the intercarrier compensation rate at zero, which is not cost-based or consistent with the 1996 Act. Accordingly, the Commission should reject proposals that would result in mandatory bill-and-keep where the traffic flow between competing carriers is not balanced.

The Commission should also clarify that carriers are entitled to use virtual NXX codes to provide valuable telecommunications services to end users, including businesses that rely on the use of telephone numbers from virtual NXX codes to compete effectively. Traffic is routed to telephone numbers from virtual NXX codes in exactly the same way that traffic is routed to telephone numbers from any other NXX. Accordingly, carriers incur the same costs to terminate traffic routed to a number from a virtual NXX code as they do for numbers from any other NXX code. Therefore, there is no basis for making a distinction between virtual NXX codes and other NXX codes for the purposes of intercarrier compensation.

The use of virtual NXX codes can also lead to more efficient numbering utilization. However, the Commission should not address issues relating to the efficiency with which carriers utilize numbering resources in this proceeding, because the Commission is considering these issues, including numbering optimization measures involving the use of virtual NXX codes, in CC Docket No. 99-200.

I. MANDATORY BILL-AND-KEEP WILL NOT FOSTER COMPETITION

Fostering competition should be the primary focus of the Commission in this proceeding, as the public interest and the 1996 Act require. Competition creates incentives for carriers to efficiently use, and invest in, telecommunications networks. Thus, KMC urges the Commission to consider the overall effect on competition that specific proposals will have rather than focusing solely on how specific aspects of these proposals may or may not affect certain competitive strategies.

Cost-based intercarrier compensation rates are crucial to the development of competition, particularly where one carrier – or class of carriers – has market power and traffic balances between the carriers are not roughly equal. The prospect of having to pay symmetrical intercarrier compensation rates to competitive carriers restrains incumbent local exchange carriers ("ILECs") from exercising their market power to the detriment of competition. The downward trend in reciprocal compensation rates since the 1996 Act would never have occurred without symmetrical intercarrier compensation rates.

In the NPRM, the Commission seeks comment of the feasibility of a bill-and-keep approach for a unified regime of intercarrier compensation.[2] KMC supports unified intercarrier compensation regimes that allow carriers voluntarily to agree to bill-and-keep, or that require bill-and-keep where the traffic flow between competing carriers is roughly in balance. However, KMC opposes mandatory bill-and-keep where the traffic flow between competing carriers is not roughly in balance. Under these circumstances, imposition of a mandatory bill-and-keep regime would unintentionally blunt the competitive forces that have prevented carriers with market power from exercising that power anti-competitively. Specifically, if bill-and-keep is mandated, there will be no incentive for the ILECs to use the networks of the CLECs in an efficient manner, or to structure their own networks in a way that will allow the CLECs to lower their costs.

[2] NPRM at ¶ 1. In the NPRM, the Commission notes that it adopted bill and keep as an interim measure in the *ISP Intercarrier Compensation Order*. *See, e.g.*, NPRM at ¶ 3, *citing* Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report und Order*, FCC 01-131 (rel. April 27,2001) ("*ISP Intercarrier Compensation Order*"). KMC strongly opposes the *ISP intercarrier Compensation Order* and has filed a petition for review of that order in the U.S. Court of Appeals for the D.C. Circuit. KMC urges the Commission not to assume that it will be upheld on appeal.

Rather, mandatory bill-and-keep would create incentives for ILECs to reconfigure their networks in order to maximize the costs that other carriers incur to terminate ILEC-originated calls while minimizing the costs that the ILECs incur to terminate calls originated by the other carriers. Moreover, CLECs have a much smaller customer base over which to spread termination costs, which will make it much more difficult for CLECs to recover termination costs from their end users than for ILECs. Under these conditions, competition is unlikely to develop.

With respect to "regulatory arbitrage," bill-and-keep offers no advantage whatsoever over cost-based intercarrier compensation rates. The imposition of mandatory bill-and-keep would create new regulatory distinctions (*e.g.*, the definition of central office or local access) that would determine which interconnecting carrier would bear the costs of transport and access, and thus which carrier would have to recover these costs from its end users. Implementation of these new regulatory distinctions, which have no real meaning in the context of the network, would be administratively burdensome, complex, and expensive.

The imposition of mandatory bill-and-keep where the traffic flows between competing LECs are not balanced is also illegal.[3] The Commission has repeatedly "acknowledge(d) that, no matter what the payment arrangement, LECs incur a cost when delivering traffic . . . that originates on another LEC's network."[4] The 1996 Act establishes a presumption that costs imposed as a result of the exchange of traffic between competing LECs must be recovered. Section 251(b)(5) provides that "[e]ach telecommunications carrier has the duty . . . to establish reciprocal *compensation* arrangements for the transport and termination of

3 However, carriers may agree voluntarily to bill-and-keep provisions (or variations thereof) in negotiated agreements.

4 *ISP Intercarrier Compensation NPRM*, ¶ 29.

telecommunications."[5] Section 252(d)(2) provides that the reciprocal compensation arrangement must (1j provide for the "mutual and reciprocal" recovery of costs by each carrier; (2) determine these costs on the basis of a "reasonable approximation of the additional costs" of terminating traffic; and (3) does not preclude bill and keep arrangements.[6] Mandatory bill-and-keep regimes do not meet the "compensation" requirement of Section 251(b)(5j or the "reasonable approximation of the additional costs" requirement of Section 252(d)(2) because they result in a reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal. For the same reasons, mandatory bill-and-keep regimes violate Section 201(b) of the Act, which requires that "all charges, practices, classifications and regulations" be "just and reasonable."[7] An intercarrier compensation rate of "0" is not just and reasonable.

Where the traffic flow between competing carriers is not roughly in balance, the economically sound cost causation and recovery principles upon which the Commission relied when implementing the 1996 Act suggest that TELRIC-based intercarrier compensation rates should apply.' The Commission already has determined that TELRIC-based rates promote efficient competitive entry and competition, which in turn expand consumer choice, spur innovation, and move end user prices toward cost.' Therefore, KMC urges the Commission to

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5 47 U.S.C. § 251(b)(5) (emphasis added).

6 47 U.S.C. § 252(d)(2).

7 47 U.S.C. § 201(b).

8 Eventually, this same rate also should apply to terminating exchange access for interstate calls. **A** minute is a minute – the jurisdictional nature of traffic does not affect the way in which costs are incurred.

9 *E.g., Implementation of the Local Competition **Provisions in** the Telecommunications Act **of** 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 679,705 (1996) (*"Local Competition Order"*j, *aff'd in part and vacated in part sub nom. Competitive Telecommunications **Ass**'nv. FCC,* 117 F.3d 1068 (8th Cir. 1997) (*"CompTel"*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (**8**th Cir. 1997) ***("Iowa** Utils. Bd."*), *a f d in **part** and reversed in part sub nom. **A** T&T v. Iowa Utils. Bd.*, 119 **S.** Ct. 721 (I999).

adopt a unified intercarrier compensation regime that relies on TELRIC-based rates rather than mandatory bill-and-keep where the traffic flow between competing carriers is not roughly balanced.

II. LECs ARE ENTITLED TO USE VIRTUAL NXX CODES

In the NPRM, the Commission seeks comment on the use of virtual central office codes ("NXXs"), which are "central office codes that correspond with a particular geographic area [a rate center] that are assigned to a customer located in a different geographic area [rate center],'' and their effect on the reciprocal compensation and transport obligations of interconnected LECs.[10] Specifically, the Commission asks for comment on the following issues: (1) under what circumstances should a LEC be entitled to use virtual NXX codes? (2) If LECs are permitted to use virtual NXX codes, what is the transport obligation of the originating LEC? (3) Should the LEC employing the virtual NXX code be required to provide transport from the central office associated with those NXX codes?"

KMC submits that the correct answers to these questions become clear upon consideration of the way in which LECs utilize virtual NXX codes. As an initial matter, it is important to note that virtual NXX codes allow business end users to widen their "local" market presence, which many businesses, particularly smaller ones, rely upon to establish a market presence and compete effectively. The benefits that result from the use of virtual NXX codes flow through to consumers as well. For example, consumers who subscribe to dial up internet access or to digital television recorder services (*e.g.*, TIVO - or ReplayTV-style services) may

10 NPRM at ¶ 115.

11 *Id.*

rely upon virtual NXX codes to use these services by calling a number associated with their geographic area.

A. Traffic Is Routed to a Virtual NXX Code in Exactly the Same Manner as to Any Other NXX Code.

Traffic routed to telephone numbers from virtual NXX codes is identical to all other traffic that is subject to reciprocal compensation pursuant to Section 251: (1) the calling party originates a call by dialing a seven- or ten-digit number; **(2)** the originating carrier delivers the call to the terminating carrier's switch pursuant to the interconnection agreement that governs the relationship between the originating and terminating carrier; **(3)** the terminating carrier delivers the call to the called party. For all of this traffic, the originating carrier is responsible for delivering the calls to a designated point of interconnection ("POI") with the terminating carrier: The respective locations of the POI and the terminating and originating carriers do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete the call. Accordingly, the network configuration of both the originating and terminating carriers, and thus the transport costs that the terminating carrier incurs, does not vary based on whether the number that the called party has opted to use. For this reason, the originating carrier cannot determine whether the called party for any given call is using a number from a virtual NXX.

The fact that traffic routed to telephone numbers from virtual NXX codes is identical to all other traffic that is subject to reciprocal compensation pursuant to Section 251 becomes even more clear when contrasted with exchange access traffic. Traffic routed to telephone numbers from virtual NXX codes are delivered directly from the originating LEC to the terminating LEC; Exchange access traffic is routed from the originating LEC to the IXC chosen by the calling party, which then routes the traffic to the terminating LEC. As such, the costs and billing procedures for terminating exchange access traffic is completely different than those associated with terminating traffic to a telephone number from a virtual NXX code, which is identical to any other NXX code.

Given the way in which virtual NXX codes are used, there is no reason why a LEC should not be entitled to use telephone numbers from virtual NXX codes the same way they are entitled to use telephone numbers from any other NXX code. Because traffic delivered to numbers from virtual NXX codes is identical to traffic delivered to any other NXX code, the terms and conditions for the delivery of this traffic, like all traffic, should continue to be determined by the interconnection agreement between the originating and terminating carriers. It would be particularly inappropriate to ban the use of virtual NXX codes due to disagreements over transport costs. Banning the use of virtual NXX codes would simply mask disagreements over the proper number and placement of POIs by denying consumers and businesses, particularly small businesses, the freedom to choose telecommunication services that they utilize to compete effectively in their local markets throughout the United States.

B. The Act Provides No Basis For Treating Traffic Differently Based Solely on Whether It is Routed To A Virtual NXX or Any Other NXX Code For the Purposes of Intercarrier Compensation.

The 1996 Act does not classify traffic on the basis of whether it is routed to a telephone number from a virtual NXX code or any other NXX code. Specifically, traffic that meets the definition of "telecommunications traffic" and is subject to reciprocal compensation pursuant to Section 251(b)(5)[12] remains telecommunications traffic whether it is routed to a telephone number from a virtual NXX code or any other type of NXX code. Consequently,

[12] 47 **U.S.C.** § 251(b)(5).

where the statute mandates that traffic be subject to reciprocal compensation pursuant to Section 251(b)(5), then the type of NXX code – or any other NANPA numbering resource for that matter – to which the traffic is routed is irrelevant.

C. The Commission Should Consider the Potential Effects of Virtual NXX Codes on Numbering Utilization in CC Docket 99-200 Rather Than Here

KMC urges the Commission to consider the potential effects that the use of virtual NXX codes may have on numbering utilization in CC Docket No. 99-200, Numbering Resource Optimization, rather than this proceeding on intercarrier compensation. In CC Docket No. 99-200, the Commission is examining a number of measures to improve the efficiency with which carriers utilize numbering resources. These measures are interrelated, and the implementation of one measure may have a detrimental effect on other measures. Consequently, it would not be wise to discuss the potential effects on numbering utilization of one specific issue in an unrelated docket on intercarrier compensation.

The Commission is considering various numbering optimization measures that involve the use of virtual NXX codes in CC Docket No. 99-200. For example, the Commission has already identified rate center consolidation as one of the most effective means of numbering optimization, which would greatly reduce end user demand for virtual NXX codes.[13] Moreover, the Commission has requested and received comment on the use of Extended Local Calling Areas ("ELCAs") as possible means of numbering optimization.[14] The use of ECLAs permit carriers to assign numbers from a single NXX to cover several rate centers, and thereby, to

13 *See* Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 99-200, DA 01-656 (rel. March 14, 2001) at ¶ 10.

14 *See* Specific or Service-Specific Area Code Overlays, CC Docket 99-200, *Notice of Proposed Rulemaking*, 14 FCC Rcd 10322 (rel. June 2, 1999) at ¶ **121.**

utilize only as many NXX codes as are necessary to serve their customers, rather than obtaining one NXX per rate center.[15] Because the NXX code in an ELCA can only be associated with a single rate center for routing purposes, the NXX code would be a "virtual NXX code" with respect to each customer within the ELCA who is located in a rate center other than the one with which the NXX is associated. Although KMC strongly supports rate center consolidation, it takes no position on ELCAs or any other numbering optimization measures in this proceeding. KMC raises these issues merely to point out that the Commission is already considering the potential effects of virtual NXX codes on numbering utilization in CC Docket No. 99-200. Accordingly, the Commission should focus solely on intercarrier compensation issues as part of this proceeding.

CONCLUSION

For the foregoing reasons, KMC urges the Commission to reject proposals to impose a mandatory or default bill-and-keep regime on intercarrier compensation.

Respectfully submitted,

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Dated: August 21,2001

CERTIFICATE OF SERVICE

I, Michelle Arbaugh, hereby certify that I have caused a copy of the foregoing Comments of KMC Telecom, Inc. in the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, to be served on this 21st day of August 2001, via hand-delivery, upon the following:

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